IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE SIDE

WRIT PETITION NO. 6508 OF 2006

Shahu Chatrapati Mills, Kolhapur.... Petitioner

versus

M/s. Advanced Construction Company and others ..... Respondent.

Mr. Siddharth Karpe i/b M/s. Y.K.S. Legal for the petitioner
Mr. Amit borkar for Respondent no.1.

CORAM; A.P. DESHPANDE, J.
DATED; 11TH JULY, 2007

P.C.;

1. The present petitioner is the original defendant no.2. The respondent no.1 instituted a suit for recovery of amount of Rs.1,63,000 and odd against the present petitioner. The suit has been filed way back in the year 1982. The petitioner filed his written statement and thereafter the suit proceeded further. In the year 2005 the respondent/plaintiff moved an application for amendment, with a view to enhance the suit claim from Rs.1,63,000/- to Rs.1,87,000/- and the trial court allowed the amendment. On account of allowing the amendment of the plaintiff, the defendants were permitted to carry out consequential amendment. Taking advantage of the said order, the petiitoner while filing the amended written statement

has set up a counter claim. When an objection came to be raised by the respondent to the counter claim, the trial court has rejected the counter claim filed by the petitioner and hence this writ petition has been filed challenging the said impugned order.

2. It is an admitted position that before filing of the counter claiom, which is subject matter of this writ petition a counter claim was set up by the petitioner by an application filed at Exh.155 before the trial court. The present counter claim is identical with the one sought to be set up by an application at Exh.155. The counter claim was rejected and aggreived thereby the petitioner has filed the writ petiiton in this court. The writ petition has been dismissed on merit observing that the same was not maintainable. Thereafter the same counter claim has been again set up under the grab of filing of written statement with a view to file consequential amendment pursuant to the amendment permitted in the plaint.

4. Perused the judgment of the Apex Court in **Ramesh Chand Ardawatiya Vs. Anil Panjwani reported in AIR 2003 S.C. 2508.** In para 28 or the judgment the Apex Court has held that: "there are three modes of pleading or setting up a counter claim in a suit.

Firstly by the written statement, secondly by way of amendment incorporated subject to the leave of the court in the written statement and thirdly a counter claim by way of subsequent pleading under Rule 9". Under the first mode,it is as of a right, whereas under the two later modes the same would be subject to the discretion of the court concerned. The parametres of exercising discretion are also set out in the judgment. The court observes thus:

> "Generally speaking, a counter claim not contained in the original written statement may be refused to be taken on record if the issues have already been framed and the case set down for trial, and more so when the trial has already commened".

5. As stated hereinabove, the evidence of plaintiff is already over and the evidence of defendant is being led. Allowing the counter claim, at this stage, would result in pushing back the progress of the suit and hence the trial court has rightly rejected the counter claim. Besides this, it is re-interated with the risk of repetition that identical counter claim was rejected by the trial court and the writ petition filed by the petitioner has been dismissed. Despite the said dismissal yet again a counter claim has been

filed. There is absolutly no merit in the writ petition. The same is summarily dismissed.

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